No. 42838-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kody Chipman,

Appellant.

Thurston County Superior Court Cause No. 11-1-00491-4

The Honorable Judge Paula Casey

Appellant's Reply Brief

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I. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT.

A conviction for vehicular homicide requires proof that the accused person's driving proximately caused injury to another. RCW 46.61.522; see also State v. Hursh, 77 Wash. App. 242, 246, 890 P.2d 1066 (1995) abrogated on other grounds by State v. Roggenkamp, 153 Wash. 2d 614, 106 P.3d 196 (2005). The Information in this case did not allege that Mr. Chipman's driving was the proximate cause of injury. CP 11. Instead, it alleged (1) that he drove and (2) that he caused injury; it did not link the driving with the injury. CP 11.

Reckless driving is a crime, and the infliction of substantial bodily harm is sometimes a crime, but unless the two are linked, these actions do not constitute vehicular assault. Respondent erroneously asserts that "[t]he only word left out [of the Information] is 'proximately,'" and asks the Court to excuse the omission by applying the liberal standard used for postverdict challenges. Brief of Respondent, p. 17.

In fact, the Information omitted two words, not just one. To be adequate, the charging document should have alleged that Mr. Chipman "did operate or drive a vehicle in a reckless manner and/or with disregard for the safety of others; and (1) thereby (2) proximately caused substantial bodily harm..." CP 3-4 (modified with italicized language). As written,

the charging language only expressed that Mr. Chipman drove in the manner described and that he caused substantial bodily harm; it did not convey that his subpar driving cause the harm. CP 3-4.

Respondent does not address this deficiency, other than to note that "[n]othing in the language even suggests that the harm can be caused by anything other than the driving." Brief of Respondent, p. 17. This reflects a misunderstanding of the kind of notice required by the constitution. A charging document must include all essential elements.

The Information in this case did not. Because the Information was deficient, prejudice is conclusively presumed,[1] and the charges must be dismissed. State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

II. MR. CHIPMAN WAS ENTITLED TO INSTRUCTIONS ON THE LAWFUL USE OF FORCE.

An accused person is entitled to instructions on self defense if there is "some evidence" supporting the instruction. State v. Werner, 170 Wash. 2d 333, 336, 241 P.3d 410 (2010). The evidence must be taken in a light most favorable to the accused person. State v. George, 161 Wash.App. 86, 96, 249 P.3d 202 (2011); State v. Webb, 162 Wash.App. 195, 208, 252 P.3d 424 (2011). The trial court failed to do this; instead,

[1] Respondent's argument regarding prejudice is thus irrelevant. Brief of Respondent, pp. 17-18.

the judge refused to instruct on self-defense because Mr. Chipman did not testify. RP (10/17/11) 543.

This is an error of law, requiring de novo review. State v. Walker, 136 Wash.2d 767, 771, 966 P.2d 883 (1998). Without citation to the record or any authority, Respondent attempts to recast the trial court's decision as factual. Respondent argues that the trial judge's words must be taken in context, and suggest that Appellant has misconstrued the court's ruling. Brief of Respondent, pp. 29-30. But Respondent's reading of the record is somewhat strained. The trial judge clearly announced that Mr. Chipman's failure to testify was the deciding factor in the decision not to instruct on self defense:

> [W]ithout the defendant's testimony, I am definitely not planning to [instruct on self-defense]...[T]hat was my basic plan even should he testify, but I was going to wait to hear his testimony. RP (10/17/11) 543.

Respondent does not dispute that it would be improper to refuse the instructions because Mr. Chipman exercised his right to remain silent at trial. See Brief of Respondent, generally. Under these circumstances, the refusal was based on a misunderstanding of the law,[2] and review must be de novo.

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[2] See, e.g., State v. Walker, 164 Wash.App. 724, 729, 265 P.3d 191 (2011) ("a defendant must produce some evidence demonstrating self-defense from 'whatever source' and that the evidence does not need to be the defendant's own testimony"); see also State v. Miller, 89 Wash.App. 364, 368, 949 P.2d 821, 823-24 (1997) (self-defense properly raised by testimony of third-party witness).

Even if the court's decision had been based on a factual dispute, reversal would be required. The trial judge is not permitted to resolve factual disputes when evaluating the need for self-defense instructions; instead, the court must take the evidence in a light most favorable to the defense. Webb, at 208.

The record in this case, when taken in a light most favorable to Mr. Chipman, includes at least "some evidence" of self defense: Mr. Chipman was accosted by two belligerent strangers who pulled open his car door, tried "to get [him] out of his car," and acted as though they intended to restrain him against his will.[3] RP 12-17, 24, 63, 83-86, 91, 96, 98, 100, 118, 127, 176. Mr. Chipman was scared and "weirded out" because the men were up in his face. RP 367, 371, 372, 440-462, 490-501. In response, all he did was to put his car in reverse and drive away—an intentional act, performed for self protection, resulting in injury to Cooper and Kitchings. RP 441-442.

Respondent applies the wrong standard when analyzing the facts. Instead of taking them in a light most favorable to Mr. Chipman, Respondent describes the scene from the prosecution's point of view. See, e.g., Brief of Respondent, pp. 21-22 ("Kitchings denied telling Chipman he could not leave and testified he would not have stopped him…"

[3] Under these circumstances, Mr. Chipman may even have been entitled to use deadly force. RCW 9A.16.050.

"[Cooper] also denied telling Chipman that he wasn't going to be allowed to leave.") Respondent's main point appears to be that "[t]he evidence does not support a conclusion that [Mr. Chipman] was subjectively afraid." Brief of Respondent, p. 21.

This argument is undermined by Respondent's admission that Mr. Chipman told law enforcement he was afraid. Brief of Respondent, p. 24. Respondent attempts to shade this evidence by suggesting that Mr. Chipman's fear wasn't genuine. Brief of Respondent, p. 25 ("Chipman never claimed to be afraid of the victims until Trooper Eisfeldt handed him the word 'scared.'") But the genuineness of his fear was an issue for the jury. The issue on appeal is whether the testimony—when taken in a light most favorable to Mr. Chipman—included "some evidence" establishing his subjective fear, as an element of self-defense. Werner, at 336-337. Respondent does not seem to understand this standard.

Nor does Respondent acknowledge when self-defense is available. The use of force is justified not just to prevent physical harm, but also to resist a malicious trespass or malicious interference with personal property, and to resist the commission of any felony against the person claiming self defense, or any felony committed in his or her presence. RCW 9A.16.020; RCW 9A.16.050; see also, e.g., State v. Douglas, 128 Wash. App. 555, 116 P.3d 1012 (2005) (defendant entitled to use deadly force in resisting residential burglary when guest became aggressive and

refused to leave). Respondent's arguments are primarily directed at the use of force to resist physical harm. Brief of Respondent, pp. 26-27.

Under the statute, Mr. Chipman was entitled to use force to resist not only physical harm, but also malicious trespass, malicious interference with his property, or commission of a felony. Douglas, at 566-569. When taken in a light most favorable to Mr. Chipman, the evidence showed that Cooper and Kitchings threatened to assault him (i.e. by planning to pull him from the car), committed a malicious trespass or malicious interference with personal property (by opening his car door, resting against the car, and preventing the car from leaving), and threatened to commit a felony (i.e. by unlawfully imprisoning him).[4] Respondent makes no effort to address the statutes (RCW 9A.16.020 and .050) that allow the use of force under these circumstances, and completely fails to analyze the evidence in a light most favorable to Mr. Chipman.

Nor should the "amount of force" preclude a self-defense claim: the reasonableness of Mr. Chipman's actions was a question for the jury; it

[4] Respondent suggests that Cooper and Kitchings would have been justified in making a "citizen's arrest." Brief of Respondent, p. 27. This argument is wholly irrelevant. If a citizen's arrest were in fact justified, Cooper and Kitchings would have a viable defense if criminally charged. Cf. State v. Hendrickson, 98 Wash. App. 238, 240-41, 989 P.2d 1210 (1999). Respondent cites no authority suggesting that the state can use a "citizen's arrest" theory to prevent an accused person from presenting a self-defense claim to the jury. Where no authority is cited, counsel is presumed to have found none after diligent search. Coluccio Constr. v. King County, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007). Furthermore, Respondent's "citizen's arrest" theory fails to take the evidence in a light most favorable to Mr. Chipman, as required in this context. George, at 96.

should not have been weighed and judged by the court. Mr. Chipman's theory did not involve a deliberate attempt to harm Cooper and Kitchings, or to inflict the severe injuries ultimately suffered; instead, his defense was that he tried to escape from them, and that their injuries were incidental to his efforts. All he was required to show was that "the action that caused the victim's injury"– in this case, the act of driving away—"was not accidental, but rather made in order to protect the defendant." State v. Dyson, 90 Wash.App. 433, 434, 952 P.2d 1097 (1997). Respondent's claim that Mr. Chipman should have "eased the car back" or "called 911" reflects Respondent's persistent failure to examine the evidence in a light most favorable to Mr. Chipman as the proponent of the instruction. See Brief of Respondent, p. 28.

Furthermore, when taken in a light most favorable to Mr. Chipman, the evidence did not suggest he was the aggressor. Despite Respondent's suggestion that Mr. Chipman was "arguably the aggressor"[5] the facts were insufficient to permit an aggressor instruction, much less to deny Mr. Chipman his self-defense claim in the first place. See, e.g., State v. Stark, 158 Wash. App. 952, 244 P.3d 433 (2010), review denied, 171 Wash. 2d 1017, 253 P.3d 392 (2011); Douglas, supra. Respondent's use of the word "arguably" demonstrates the weakness of the state's position.

[5] Brief of Respondent, p. 29.

According to Respondent, the "main reason" to deny the proposed self-defense instructions was that Mr. Chipman "denied ever hitting anyone." Brief of Respondent, p. 29. This reflects a misunderstanding of the law: if there is "some evidence" supporting self-defense, the instructions must be given, even where there is contradictory evidence. See, e.g., State v. Fernandez-Medina, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000) (applicable instructions on lesser offense must be given even if defendant presents alibi defense). When taken in a light most favorable to Mr. Chipman, the evidence shows that Cooper and Kitchings were injured as a result of intentional actions that he took to protect himself. That is all that is required. Dyson, at 434. Self-defense thus applies, even if Mr. Chipman did not know he'd hit the two men. Id.

The court's refusal to instruct on self-defense violated Mr. Chipman's due process rights. Werner, at 337. The convictions must be reversed. Id.

III. THE TRIAL COURT VIOLATED MR. CHIPMAN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE.

Mr. Chipman rests on the argument set forth in the Opening Brief.

IV. MR. CHIPMAN'S EXCEPTIONAL SENTENCE WAS IMPROPERLY BASED ON FACTORS CONSIDERED BY THE LEGISLATURE IN SETTING THE STANDARD RANGE.

This issue will likely be controlled by the Supreme Court's decision in State v. Pappas, 164 Wash.App. 917, 265 P.3d 948 (2011) review granted, 173 Wash.2d 1026, 273 P.3d 982 (2012) (argument set for September 13, 2012). Accordingly, Mr. Chipman rests on the argument set forth in the Opening Brief.

CONCLUSION

Mr. Chipman's convictions must be reversed and the charges either dismissed without prejudice or remanded for a new trial.

Respectfully submitted on August 26, 2012,

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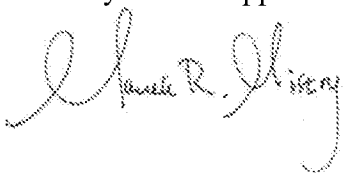

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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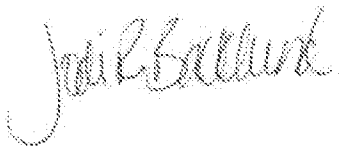
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 26, 2012.



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